No. 96-1462

IN THE

# Supreme Court of the United States

OCTOBER TERM 1996

CHRISTOPHER H. LUNDING, BARBARA J. LUNDING,

*Petitioners,*

—v.—

TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK, COMMISSIONER OF TAXATION AND FINANCE OF THE STATE OF NEW YORK,

*Respondents.*

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

## REPLY BRIEF FOR PETITIONERS

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## ARGUMENT

### A. Section 631(b)(6) Of The New York Tax Law Clearly Discriminates Against Nonresidents

In this Reply Brief, Petitioners address certain of the matters raised in the Brief ("Resp. Brf.") of Respondent Commissioner of Taxation and Finance ("Respondent"). In their opening brief, Petitioners argued forcefully that New York Tax Law Section 631(b)(6) ("Section 631(b)(6)") discriminates against nonresidents who pay alimony in that it denies

them substantial equality of treatment with residents in the taxation of personal income. In response, Respondent asserts that "the substantial equality of treatment required by the Privileges and Immunities Clause is satisfied." Resp. Brf. at 8. This assertion lacks the slightest support in the record or in law.

It is undisputed that Section 631(b)(6) was the sole basis upon which Petitioners were denied a proportionate deduction for alimony paid, increasing their 1990 New York State personal income tax burden by $3,724, or almost 15%. In contrast, in *Austin v. New Hampshire*, 420 U.S. 656 (1975), the Court found a lack of substantial equality of treatment of nonresidents sufficient to require more than bald assertion to avoid a holding of violation of the Privileges and Immunities Clause when a State tax statute increased the net tax payable on a nonresident's earnings by only $242. *Id.* at 665-66, n.10. Thus, it is quite obvious that Section 631(b)(6) discriminates on its face against nonresidents, does not treat nonresidents with substantial equality and therefore "burdens one of those privileges and immunities protected by the [Privileges and Immunities] Clause," *United Building & Constr. Trades Council v. Mayor and Council of Camden*, 465 U.S. 208, 218 (1984). This reality requires Section 631(b)(6) to be held unconstitutional unless there are demonstrated to be legally cognizable substantial reasons for this discrimination which bear a close relation to it.

### B. The Justifications Offered For Section 631(b)(6) Are Insufficient To Support Its Constitutionality

Respondent also attempts to sustain the constitutionality of Section 631(b)(6) by asserting that Petitioners' "alimony payments were intimately connected to petitioners' personal and family activities outside New York." Resp. Brf. at i. Since there is nothing whatsoever in the record about any such "intimate" activities, whether within or without the State of



New York, this statement is mere puffery. Money is fungible, and until such time as it grows on trees, the vast majority of citizens of this country must pay their expenses by earning it through personal service. Indeed, it has been stipulated here that New York was the principal source of earned income of Petitioner Christopher H. Lunding in 1990, ALJ Determination at 2, Paragraph 1, App. 26a, and therefore obviously was a principal source of the funds from which his alimony obligation in that year was paid; and, equally obviously, Petitioners' alimony payments were connected with income arising from New York sources.

In any event, once Petitioners' standing is established (which obviously it is here), the particular facts of Petitioners' personal and family life have no relevance to the legal issues at hand. This is because when a statute is attacked as unconstitutional on its face, the proper test of its constitutionality is not the amount of wrong done in the instant case, but what may be done in other cases, *Montana Co. v. St. Louis Mining and Milling Co.*, 152 U.S. 160, 169 (1894); that is, the constitutional validity of a statute on its face is to be tested not by what has been done under it, but rather by what may, by its authority, be done. *Id.* at 170. *See, e.g., Planned Parenthood Ass'n of Chicago v. Kempiners*, 700 F.2d 1115, 1124 (7th Cir. 1983) (describing this test of constitutionality as "well-settled"). As the lower court recognized in *Travis*, "it is the personal knowledge of us all that the only appreciable source of income of thousands of nonresidents . . . lies within the confines of this state . . . ." *Yale & Towne Mfg. Co. v. Travis*, 262 F. 576, 581 (S.D.N.Y. 1919), *aff'd*, 252 U.S. 60 (1920); and analytically it is in reference to the legal interest of all alimony paying nonresidents, as well as their own particular interest, that Petitioners proceed here. Put concisely, when, as here, a statute discriminates against nonresidents solely on the basis of their status as such, its constitutionality may not be defended by reference to

facts and issues extraneous to that pure and unitary basis for discrimination.[1]

Dicta in the *Travis* case said to approve of the constitutionality of former Section 360, Paragraph 11 of the New York tax laws are not to the contrary. The statute there referred to provided that a nonresident was not allowed to take deductions against New York income except to the extent connected with income arising from sources within New York. *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60, 73 (1920); and the opinion below in that case stated as a fact that "nonresidents are allowed such proportion of deduction as the income arising from sources within [New York] bears to the total income," 262 F. at 577. It was in this factual context that dicta in *Travis* regarding deductions should be considered. In contrast, Section 631(b)(6) arbitrarily determines by legislative *fiat* that alimony payments by nonresidents never can be considered to any extent to be New York sourced; in this lies its unconstitutionality.

It is regrettable that the New York Court of Appeals did not acknowledge here its own decision in *Smith v. Loughman*, 245 N.Y. 486, 157 N.E. 753, *cert. denied*, 275 U.S. 560 (1927), in which a New York statute imposing a tax at rates different than those borne by residents on transfers by will or intestate succession of New York property owned by nonresidents was declared to violate the Privileges and Immunities Clause.

Speaking for the court, Chief Judge Cardozo observed of that statute:

> In some instances the burden for the non-resident is vastly heavier than for the resident . . . . In other instances . . . the burden for the non-resident may be lower than for the resident. Whether these inequalities will balance one another in the long run as applied to

[1] One such extraneous issue is whether or not in 1990 Connecticut taxed the earned income of its residents, which in that year it did not.



> non-residents generally, we can do little more than guess. What is certain is that the inequalities will not balance, but will inevitably persist, whenever certain classes of non-residents . . . are compared with like classes of residents. What is also certain is that non-residence without more has been made the basis for the divergent burdens of one class and another.

*Id.* at 492-93, 157 N.E. at 755.

The court then held discrimination in rates "[d]eeper by far and wider" than the discrimination in exemptions in *Travis*, 245 N.Y. at 495, 157 N.E. at 756, and concluded by holding that:

> The principle of equal treatment for the citizens of all the States is a good more precious than the gain of revenue in one year or another. We are not to whittle it down by refinement of exception or by the implication of a reciprocal advantage that is merely trivial or specious. The principle is put in jeopardy—there is set in it an entering wedge that may be the beginning of its destruction—if this statute is upheld.

*Id.* at 496-97, 157 N.E. at 757. Based on these fundamental principles, long and consistently applied, the constitutionality of Section 631(b)(6) of the New York Tax Law cannot be sustained.

## CONCLUSION

For the foregoing reasons, the judgment below of the Court of Appeals of New York should be reversed, and Section 631(b)(6) of the New York Tax Law declared to be unconstitutional and in conflict with the Privileges and Immunities Clause (Article IV, Section 2) of the Constitution of the United States.

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Respectfully submitted,

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